SUPREME COURT, U. S.
No. 909
JAN 6 1969
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

ELMER HAHN,

Petitioner,

v.

KENTUCKY ALCOHOLIC BEVERAGE CONTROL BOARD, and its individual members, HAROLD MOBERLY, A. B. MEADE and R. CAREY GRAHAM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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This petition prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, in case numbers S-26-67 and S-27-67 of that Court, decided and entered of record in the above-entitled case on October 4, 1968.

REPORTS OF THE OPINIONS BELOW

This Court is respectfully referred to the contents of Appendix "A" of this petition, where the unofficial report of the opinion of the Court of Appeals of Kentucky in this case is reprinted verbatim. There were no other opinions or reports written or issued by the Courts below.

JURISDICTIONAL BASIS FOR PETITION

On June 14, 1968, the Court of Appeals of Kentucky, in case numbers S-26-67 and S-27-67 affirmed the judgment of the Franklin Circuit Court of Kentucky, which trial court sustained an order, issued by the Kentucky Alcoholic Beverage Control Board against the defendant-petitioner, finding the defendant-petitioner guilty of violating the Board's orders. The decision of affirmance by the Court of Appeals of Kentucky was entered on the same date. The Court is respectfully referred to the contents of Appendix "A" of this petition for the unofficial verbatim report of the opinion.

Petitioner made an application for a re-hearing by the Court of Appeals of Kentucky. The petition for a rehearing was heard by that Court on October 4, 1968 and the Court affirmed its opinion of June 14, 1968. Thereafter, the same Court issued a Mandate to the Kentucky Alcoholic Beverage Control Board which revoked the petitioner's liquor licenses and closed up his two places of business, The Holiday Hotel and the Market Cafe.

Believing that the petitioner's Constitutional rights were violated in various ways during the course of the trial in the Franklin Circuit Court of Kentucky, and having obtained no recourse in the Court of Appeals of Kentucky, this petition is founded on the provisions of Title 28, United States Code § 1257 (3).

STATEMENT OF QUESTIONS PRESENTED

(1) Where it is almost the universal custom and administrative practice of a state administrative board to punish infractions of the character of that committed by the petitioner, by suspension rather than revocation of the licensee's license, does the severe penalty imposed by

the Kentucky Alcoholic Beverage Board against the petitioner countenance a discrimination which was arbitrary and capricious and which constituted a denial of the equal protection of the law to petitioner within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution?

(2) Where a state statute does not specifically in its terms impose a duty upon a licensee to do any particular act, and the licensee is found to be in violation of that statute for his failure to perform such particular act, does said statute deny the petitioner equal protection of the law within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution?

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED HEREIN

Petitioner believes that his rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated before, during, and after the trial of this cause.

STATEMENT OF FACTS

On December 27, 1964, the petitioner was cited by the Alcohol Beverage Administrator of the City of Covington, Kentucky for permitting his licensed premises, the Holiday Hotel, to be open for business during the prohibited hours as set forth by city ordinance.

A hearing was held before the Administrator on January 19, 1965, with the petitioner present but not represented by counsel. The Administrator revoked the Retail Liquor Licenses of the petitioner.

This ruling was appealed to the Alcoholic Beverage Control Board of Kentucky on April 2, 1965. The Board sustained the ruling of the Alcoholic Beverage Administrator.

The petitioner then appealed the Board's decision to the Franklin Circuit Court of Kentucky on June 28, 1965 and that Court upheld the decision of the Board.

On April 5, 1966, the petitioner was once again brought before the Alcoholic Beverage Control Board; this time for a violation at another place of business, the Market Cafe. On June 2, 1966, the Board revoked the petitioner's licenses for the Market Cafe.

The petitioner appealed this action to the Franklin Circuit Court on June 10, 1966, which Court upheld the Board's decision once again.

From this point on, for appeal purposes, these two cases were consolidated. Appeal was brought before the Kentucky Court of Appeals and a judgment was rendered by Judge Hill on June 14, 1968 affirming the decision of the lower Court in revoking the petitioner's licenses.

A petition for re-hearing was timely filed and the Court of Appeals affirmed its June 14, 1968 decision on October 4, 1968.

BASIS OF FEDERAL JURISDICTION

Final judgment or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court by virtue of Section 1257 (3), Title 28, United States Code.

REASONS FOR ALLOWANCE OF WRIT

The Court of Appeals of Kentucky ruled in the instant case that the petitioner was not denied due process of

law when the Kentucky Alcoholic Beverage Control Board revoked the petitioner's licenses for a first offense when it was the custom of the Board to only suspend in similar cases. While it must be conceded that there is some authority for this ruling by lower Federal Courts, it is urged that this Court thoroughly review this point of law by a hearing on the merits.

Engaging in the liquor traffic is a privilege and not a right, subject to governmental control, *Clark Distilling Company* v. *Western Maryland R. Company,* 242 US 311, which has become so general that it has been said that Courts may judicially notice that most free governments have made the business of selling liquor a subject of regulation. Such control is justified under the police power, and embraces both prohibitory and regulatory measures, and includes the authority to prescribe reasonable rules and regulations and conditions upon which such licenses may be conducted or permitted, one illustration of which is licensing.

Although intoxicating liquors and traffic therein, where permitted or tolerated, are as lawful as any other property or business and as fully entitled to protection, yet the liquor traffic is admittedly dangerous to public health, safety and morals and it is therefore essentially within, and its regulation or prohibition is fully justified under, the police power. *Pabst Brewing Company* v. *Crenshaw,* 198 US 17; *South Carolina* v. *United States,* 199 US 437. This power is an incident of society's right to self-protection, it rests upon the right of the state to care for the health, morals and welfare of the people, and extends to everything prejudicial thereto.

In the instant case, the petitioner does not question the police power of the state but he does believe that he

should be protected from regulations which are unreasonable or oppressive.

In general, the punishment to be inflicted for a particular violation of a liquor law rests in the discretion of the trial court within the limits prescribed by the provision violated. However, the liquor laws in prescribing the punishment for their violation often discriminate between first and subsequent offenders. Conformable to the rules of criminal law, generally, it is held that enhancing the penalty for prior violators of the liquor law involves a reasonable classification which a legislature has power to make. 25 Am Jur. 261, *Habitual Criminals and Subsequent Offenders,* Sec. 3-8.

Clearly, increasing the penalty for a second offense is not a matter for objection on a trial for a first offense because the increased penalty is contingent on the commission of a second offense. *Ohio ex rel. Lloyd* v. *Dollison,* 24 S Ct 703.

To warrant an enhanced penalty the trier of the facts must determine from all surrounding facts and circumstances that the offender is an habitual offender.

In the instant case, the petitioner has never disputed the fact that he committed an offense. It is only his contention that the Kentucky Alcoholic Beverage Board should have followed its practice of prior decisions in similar cases to invoke a less severe penalty for a first time offender.

If this court denies this application for a Writ it would mean that the petitioner has been denied equal protection of the law within the meaning of the Fifth and Fourteenth Amendments as he would have been subjected to a form of punishment reserved only for him and not customarily inflicted upon similar offenders.

For a discussion of excessiveness of sentence, the Court is respectfully referred to the following authorities: *Harlan*

v. *McGourin,* 218 US 442; *Weems* v. *United States,* 217 US 349; *United States* v. *Pridgeon,* 153 US 48.

Finally, respectfully submitted, is the contention of the petitioner that the statute does not specifically impose a duty upon the petitioner to perform any particular act or that a failure to do so is a violation of law. The enforcement of this law is an infringement upon the petioner's rights and therefore, the petitioner is authorized to attack the constitutionality of this legislation. *Premier Pabst Sales Company* v. *Grosscup,* 298 US 226.

Again the petitioner is not questioning the police power of the state to regulate the liquor traffic, but only that the legislation which the state has imposed here is much too vague to allow a proper exercise of that statute.

As a result of the enforcement of this improper statute, the petitioner has sustained a direct injury; that of losing his privilege to conduct business in the liquor traffic. *Massachusetts* v. *Mellon,* 262 US 447; *Buchanan* v. *Warley,* 245 US 60; *Weaver* v. *Palmer Brothers Company,* 270 US 402.

In the opinion of the lower court we find that Judge Hill stated that the court had no authority to set aside the decision of the administrative body. Perhaps he too was intimating a vagueness in the statute.

CONCLUSION

For the above-mentioned reasons, the petitioner prays that this court will issue a writ of certiorari to the Court of Appeals of Kentucky in this cause.

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PETER PANDILIDIS

Attorneys for Petitioner,
Elmer Hahn

APPENDIX "A"

DECISION OF THE UNITED STATES COURT OF APPEALS OF KENTUCKY

CASES NO. S-26-67
S-27-67

(Rendered: June 14, 1968)

HILL, Circuit Judge. The two above-numbered appeals are consolidated.

In both appeals, Hahn seeks to reverse judgments upholding the revocation of retail liquor licenses for his premises in the city of Covington, Kentucky.

In the first-numbered appeal, we find that appellant was charged with selling liquor after closing hours fixed by the local authorities. Appellant says in his brief that he admitted the charges and asked for mercy. Clearly there was a violation of the rules, justifying revocation. Therefore, if the local administrator, whose action was approved by the board, showed no "mercy", appellant has lost out in the only forum in which the legislature has invested the qualities of "mercy." Apparently no laws have ever been enacted that bestow upon this court the power to set aside the order of an administrative body when it acts within the provisions of the statute.

When it is admitted that appellant's premises were open for business at 5:00 a.m., with ninety-eight persons celebrating the Christmas holidays on December 27, 1964, it is easy to understand why the local administrator and the control board did not show mercy.

Obviously the action of the Local Alcoholic Beverage Administrator, approved by the Kentucky Alcoholic Bev-

erage Control Board, was fully justified and supported by the charges and the evidence and will not be disturbed by this court. Cf. *Jacobs* v. *Alcoholic Beverage Control Board*, Ky., 299 S.W. 2d 613.

Perhaps enough has been said, but for good measure we refer to the second appeal (both appeals bear the same date).

In the second appeal, the charges were that (1) appellant refused an inspection by an agent of the Alcoholic Beverage Control Board (KRS 241.090); and (2) that he permitted minors to loaf and loiter on his premises at 10:45 p.m. on May 11, 1966.

A governmental agency is authorized to reserve the right of inspection. 30 Am. Jur., Intoxicating Liquors § 456.

ABC Regulation 4:50 B (1) states:

"Minors shall not be permitted to loaf or loiter in or about the barroom of any licensed premises where alcoholic beverages are sold by the drink."

These charges were supported by competent and sufficient evidence.

The judgments are affirmed.

All concur.